Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

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LEWIS G. ASHTON,

PETITIONER,

VS.

DEPARTMENT OF VETERANS AFFAIRS, ET, AL.

RESPONDENTS.

◆

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

◆

PETITION FOR WRIT OF CERTIORARI

◆

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51 pp

QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to determine whether or not the District Court and the Court of Appeals exceeded their authority in summarily dismissing a 42 U.S.C.A. 1983 Civil rights violation claim against individual New York State actors who authorized, sanctioned, and participated in an illegal disciplinary hearing, in violation of New York State Judiciary law, Art. 4-A Sects. 90 4(h),115(1) and (2), by appointing a referee who was unfit to conduct such a hearing, and should the courts below be permitted to ignore this fact and summarily dismiss my Complaint, without the benefit of a hearing, to conclude that I am seeking to overturn a state court's prior decision and correct alleged errors in the record of the disbarment proceedings, only because I requested in my addamnum clause, pursuant to 42 U.S.C.A. 1988, among other things, that as a measure of vindication, I be reinstated to my practice of law?

2. Certiorari should be granted to determine whether or not the courts below exceeded their authority by recasting the factual allegations of my complaint and on that basis summarily dismiss my "Bivens" claim against individual federal defendants who libeled and defamed me by propagating, and secreting into my file, erroneous information that I bribed V.A. officials, filed false applications and Chapter 13 bankruptcy petitions on behalf of clients, fled the New York City area with escrow deposits, and a host of other heinous crimes; even having me convicted of these crimes, which has no basis in fact, and has nothing to do with my conviction for participating in a conspiracy by notarizing two documents and making a legitimate offer to purchase a publicly listed V.A. house, and did they err in requiring that I reverse or expunge my conviction before bringing a "Bivens" action for libel and defamation which is totally unrelated to my conviction?

QUESTIONS PRESENTED FOR REVIEW - Continued

3. Certiorari should be granted to determine whether or not the courts below were correct in summarily dismissing my 5 U.S.C.A.552a(g)(1)claim under the 1974 Privacy Act, without first determining whether the information sought to be expunged was inaccurate, collected under fatally flawed procedure, or serves no useful purpose and is information with which I was never charged or convicted and the claimed inaccuracy has never been challenged by the Defendants?

4. Certiorari should be granted to determine whether or not the Courts below correctly summarily dismissed my 42 U.S.C.A. 1985(3) claim against Victor Herwitz, an attorney assigned by the Court of Appeals to handle my criminal appeal, but who instead filed an Amicus Curiae Brief, thereby jeopardizing the appeal by failing to raise significant appealable issues such as the omission of a charge to the petit jury regarding the materiality of my conduct to the conspiracy, and whose conduct was part of a larger conspiracy that included all the named individual defendants, both State and Federal, as evidenced by the communication of erroneous information among the parties?

5. Certiorari should be granted to determine whether or not the ignoring of; (a) significant facts pertinent to ALL 4 CLAIMS of my Complaint, (b) an entire claim made pursuant to 5 U.S.C.A.552a(g)(1) of the 1974 Privacy Act (c) the claim pursuant to 42 U.S.C.A.1985(3) against VICTOR HERWITZ, and his co-conspirators, and (d) a MOTION TO CONSOLIDATE all the claims, where there was no interlocutory relief requested by either side, renders the District Court's judgment void, per se, in whole or in part, and that of the United States Court of Appeals which affirmed it?

QUESTIONS PRESENTED FOR REVIEW - Continued

6. Certiorari should be granted to determine whether or not this Court should intervene where the summary dismissal of legitimate claims, COVERS UP GROSS ABUSES of the judicial process that routinely target unpopular persons, particular African American Attorneys of West Indian Decent, engaged in the practice of criminal law, a group that is punished disproportionately and with disparity? In targeting this group, both the State and Federal authorities change the rules, in violation of constitutional guarantees by employing any of a series of abuses to the judicial process which a summary dismissal of the complaint would conceal, abuses which go far beyond the contents of my complaint, including; a) shopping for judges or referees who perceivably would be less judicious b) refusing to release exculpatory information c) refusing permission to engage in discovery. When these are used in conjunction with the atrocities outlined in my Civil Complaint, such as; a)fabricating information b) distorting the facts c) applying erroneous laws d) misleading the grand jury e) omitting significant charges to the petit jury and where any attempt to redress is met by a mischaracterization of the claims and a summary dismissal of the entire case that is ordered not to be reported or used as precedential authority, it puts the participants above the law and permits a modern day lynching that begs for this Court's intervention and the exercise of its supervisory powers.

PARTIES TO THE PROCEEDING

Petitioner, Lewis G. Ashton, is a resident of Cedarhurst, New York. I am the Plaintiff in the lower court proceedings of this case and am the Appellant before the United States Court of Appeals for the Second Circuit.

Respondents, Department of Veterans' Affairs; U.S. Department of Justice, including the Federal Bureau of Investigations and United States Attorney Mary Jo White as custodian of the files in the Eastern District of New York, are defendants in the FIRST CLAIM OF THE COMPLAINT in the lower court, brought pursuant to 5 U.S.C.A. 552a(g)(1) of the Privacy Act, seeking to expunge erroneous portions of the record.

Respondents, Robert A. Hincken, Thomas M. Lastowka, W.D. Landau, Nicholas Giordano, Bruce T. Sackman, Rudolph Giuliani, Frederico E. Virella Jr., and Ruth Glushien are agents of the United States Government who acted under color of "Federal law" in violating my civil rights and constitutional guarantees, and were named as defendants in the lower court in the SECOND CLAIM OF THE COMPLAINT, brought pursuant to "Bivens".

Respondents, Milton Mollen, Vincent D. Damiani, Vito J. Titone, Leon D. Lazer, Guy J. Mangano, William C. Thompson, Lawrence Bracken, Richard A. Brown, Charles B. Lawrence, Frank A. Finnerty, Aaron Koota, and Richard C. Harrow, are state employees acting under color of "state law" in violating my civil rights and constitutional guarantees, and were named as defendants in the lower court IN THE SECOND CLAIM OF THE COMPLAINT brought pursuant to 42 U.S.C.A. 1983.

Respondent, Victor Herwitz, conspired with the named state and federal employees, and others to deny

PARTIES TO THE PROCEEDING - Continued

my constitutional guarantees in violation of 42 U.S.C.A. 1985 (3) which is the basis of my THIRD CLAIM IN THE COMPLAINT in the lower court.

Respondents, the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department and the Grievance Committee for the Second and Eleventh Judicial District of the State of New York are agencies of the State of New York which were named as defendants in the lower court so as to permit the court to vindicate my civil rights violation pursuant to 42 U.S.C.A. 1988 by expunging their record and/or reinstating me to my practice.

Each Respondent was a Defendant in the Lower Court proceedings and each was an Appellee before the United States Court of Appeals for the Second Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Lewis G. Ashton respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, Case No. 96-6254.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit appears as Appendix A to the petition and is unpublished. It affirms a judgment of the United States District Court for the Eastern District of New York, appearing at Appendix B, and the denial of a petition in the District Court to reconsider its decision, appearing as Appendix C. Both are also unpublished.

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was filed June 12, 1997. No petition for rehearing was filed in my case. This petition is filed within ninety (90) days of the above date. The jurisdiction of this Court to review the judgment on petition for certiorari is invoked under 28 U.S.C.A. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Privacy Act 1974, 5 U.S.C. 552a(g)(1)(C) provides: Whenever any agency fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual....the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection....

42 U.S.C. 1983 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

"BIVENS" imposes the same liability on persons acting under color of Federal Law.

42 U.S.C. 1985(3) provides: If two or more persons in any state or Territory conspire....., for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;.... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of

such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. 1988 (a) provides: The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause....

The 6th Amendment to the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

The 14th Amendment to the United States Constitution, section 1 provides: .... No State shall make

or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ....

STATEMENT OF THE CASE

Petitioner requests the Court to review the decision of the second Circuit. That unusual decision with flawed logic, a patent misstatement of the facts and law, and the ignoring of two entire claims, purports to affirm the summary judgment granted by Judge Mishler in the United States District Court for the Eastern District of New York.

This case consists of four distinct claims, brought separately against; (A) Individual State Defendants (B) Individual Federal Defendants (C) Federal Agencies, seeking to expunge erroneous information, and (D) Victor Herwitz and the co-conspirators.

(A) The individual state defendants jointly and severally conducted and participated in an illegal hearing in the Appellate Division of the New York State Supreme Court, Second Judicial Department, that removed me from the practice of law. The hearing was conducted in violation of New York State Judiciary Law, Art. 4-A Sections 90(4)(h), 115(1), and 115(2), by appointing a referee, the Hon. Aaron Koota, who was too old, too bigoted, too infirmed, improperly certified, and generally unfit to conduct such a hearing and who fabricated and manipulated the information presented to him to arrive at a predetermined conclusion. It is this violation of state laws that is the basis of my claim under 42 U.S.C.A. 1983 which permits an action where otherwise valid statutes have been applied in a discriminatory

manner, and where a person's constitutional guarantees, in this instance, the Sixth and Fourteenth Amendments, have been violated by those acting under color or state law.

Contrary to the decisions of both the U.S. District Court and the Court of Appeals, your Petitioner is not requesting that a federal court overturn prior decisions of a state court but rather that if I prevail in my claim, that the federal court consider reinstating me to my practice of law as a measure of restitution as is permitted by 42 U.S.C.A.1988 which allows the court to employ any remedy under law, common law or equity to vindicate a civil rights violation. If the Courts disagree with this argument, the proper procedure would be to apply another of the requested relief, not summarily dismiss the claim in its entirety which otherwise fulfills all the requirements of 42 U.S.C.A. 1983 and 28 U.S.C.A. 1343 (3). Consequently, the "Feldman" and "Zimmerman" cases, cited by both courts, that seek to review a state court's decision are irrelevant.

(B) The individual Federal Defendants fabricated and manufactured information which they secreted in my file that has now become public record. They effectively have me convicted of a host of criminal activities of which I was neither charged nor convicted including bribery; corrupting an official; manufacturing and filing fraudulent credit history, loan applications, and Chapter 13 bankruptcy petitions on behalf of clients; converting $15,000.00 in escrow money to my own use; and fleeing the New York City area as a fugitive. None of this is true, I was never charged or convicted of any of them, never engaged in any such activity, and the defendants have failed to produce one file or describe one circumstance to justify any of the claims even though I have brought suit under the Freedom of Information

and Privacy Acts in the Eastern District of New York bearing Docket No. CV-94-3793, seeking exactly that information. The consequence of their conduct is that I have been libeled and defamed which gives rise to a civil rights violation claim as authorized by Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). For the Court to summarily dismiss this claim contending that my conviction for conspiring to defraud the United States by notarizing two documents and making an offer to purchase a V.A. house should first be reversed or expunged is not the law. This logic would preclude any person convicted of a crime from seeking recourse in the Federal Court no matter what the cause of action. Consequently, the "Heck" and "Tavarez" cases cited by the Courts are inapplicable, because my claim is not one for malicious prosecution based on the conviction but is separate and distinct from the conviction.

Former U.S. Attorney Rudolph Giuliani was named in this claim because of the libelous and defamatory press release about me that he authorized (See Exhibit 29 of the Complaint).

(C) The action against the Federal agencies and United States Attorney Mary Jo White as custodian of my file in the Southern District of New York, was brought pursuant to 5 U.S.C. 552a(g)(1) and 5 U.S.C.A. 552a(g)(1)(c) of the Privacy Act of 1974 which permit an individual to bring a civil action, in a district court of competent jurisdiction, against any federal governmental agency, where such information is (i) inaccurate, (ii) was acquired by fatally flawed procedures, or (iii)....is prejudicial, without serving any proper purpose, as is described in paragraph (B) above. Even though my Complaint painstakingly made out this claim as my First cause of Action, it was completely ignored by both the District Court and the Court of Appeals.

(D) Victor Herwitz is an attorney who was assigned by the same court of appeals to handle my criminal appeal in the Southern District of New York. Without discussing the case with me, and even after I made a written request of him and the Court of Appeals that he be relieved, (See Exhibit 52 of my Complaint), he filed an "Amicus Curiae" or "Anders" Brief, completely ignoring all the appealable issues including the omission of a significant charge to the trial jury regarding the materiality of my participation in the conspiracy. Such a charge could have resulted in my being totally acquitted since my conviction was for unwittingly notarizing two documents and making a legitimate offer to of purchase a V.A. house. 42 U.S.C. Section 1985(3) permits an action against those conspiring to deprive anyone of their constitutional guarantees. Mr. Herwitz's conduct jeopardized my appeal in violation of the Sixth and Fourteenth Constitutional Amendments and I respectfully submit is actionable under 42 U.S.C. Section 1985(3). In addition there is evidence to suggest that all the named individual defendants, both Federal and State, were also a part of the conspiracy to destroy me (see the third cause of action, paragraphs 90 to 94 of my Civil Complaint), a fact from which I have been precluded any form of discovery and that has now been summarily dismissed and ordered not to be published. This claim was glossed over by Judge Mishler in his decision awarding Summary Judgment to the Defendants, and was totally ignored by the Court of Appeals in its affirmation of Judge Mishler's decision.

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REASONS FOR GRANTING THE WRIT

I

THE UNITED STATES COURT OF APPEALS HAS SO FAR

DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT IT HAS ORDERED ITS OWN "SUMMARY ORDER" NOT BE PUBLISHED OR CITED AS PRECEDENTIAL AUTHORITY, AND HAS SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT ON IMPORTANT FEDERAL QUESTIONS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

In affirming the District Court's decision to summarily dismiss my complaint in its entirety, the court of appeals relied on a 1996 Second Circuit decision, Painewebber Inc. v. Bybyk, 81F.3d 1193, (2nd Cir. 1996), which, they contend, gave them permission to review de novo the grant of a motion to dismiss. However, the facts and conclusions are radically different from the case at bar. In the "Bybyk" case, ibid, there was an arbitration agreement that the court found was controlling in determining a statute of limitation issue, there was no determination of the facts in that case. In the case at bar the Judges have examined the facts, tried the case and concluded that the facts as described in the complaint:

(a) did not make out a 42 U.S.C.A.1983 Civil rights violation against individual state defendants, even though the complaint clearly identified the sections and described the manner in which the New York State Judiciary laws were violated by the state actors;

(b) Did not make out a "Bivens" claim against the individual Federal defendants, even though the first 16 Exhibits of the complaint show how I was libeled and defamed by federal agents with erroneous information that had nothing to do with my criminal conviction. An issue which clearly should have been reserved for the trier of facts;

(c) Did not permit the U.S.C.A. 552a(g)(1) action to expunge the record with the Federal Agencies even though the information sought to be expunged was

inaccurate, acquired by fatally flawed procedures, and is prejudicial without serving any proper purpose. This claim has been totally ignored by both the District Court and the Court of Appeals; and,

(d) Did not make out a 42 U.S.C.A. 1985(3) against all the conspirators, especially Victor Herwitz, an attorney assigned by the same Court of Appeals to handle the criminal appeal, but who instead filed an "Amicus Curiae" brief. This jeopardized legitimate appealable issues such as the omission of a jury charge by Judge Sprizzo, the trial judge, as to the "materiality" of my conduct in the conspiracy. A charge which I submit, would have affected the outcome of the case since my participation was limited to notarizing two documents and making an offer to purchase a V.A. house, Exhibits 19,20,21 of the Complaint. Again, an issue that should be reserved for the trier of facts.

I respectfully submit, that in a deliberate effort not to expose the abuses of the judicial process the courts have over stepped their bounds, by summarily dismissing my complaint in its entirety.

It is well settled law that, whether it is a summary judgment procedure as employed by the Federal Defendants, or a summary dismissal as employed by the State Defendants, they both should be used sparingly. ".... no plaintiff having a scintilla of merit to his cause should be denied his day in court...." was the holding in Dawn v. Sterling Drug, Inc., 319 F. Supp. 358 (C.D. California 1970). It was also the decision in the Court of Appeals in National Life Ins. Co. v. Solomon, 529 F.2d.59, (2d Cir.1975), that since Summary Judgment is a drastic device it should <u>not</u> be granted where there are major factual contentions in dispute, particularly where one party has yet to exercise its opportunities for pretrial discovery. Again, in the Southern District of New York, in Deleu v. Scaife, 775 F. Supp. 712(2d Cir. 1991), it

was reiterated, by holding that "Summary Judgment should rarely be granted when a plaintiff has not had an opportunity to resort to discovery procedures." In similar fashion, it was held in Williams v. Dallas County Com'rs, 461 U.S. 935, 77 L. Ed. 2d 309(1982), that a dismissal, for failure to state a claim or for want of subject matter jurisdiction, of a complaint under section 1983 of Title 42 which creates a federal cause of action against persons whose misconduct under color of state law violates the Constitutional rights of another, may have the effect of depriving the federal courts of jurisdiction and thus should not be deemed automatically a dismissal on the merits. I hasten to bring to this court's attention the fact that I have been prevented from conducting any form of discovery.

A closer look at both the decision of the District Court and the Court Appeals will show how they explicitly distort the facts so as to apply erroneous laws.

a) <u>The Individual State Defendants</u>

Judge Mishler, of the District Court, Eastern District of New York stated, on page 8 of his memorandum (Appendix B) where he discussed claims against the State Defendants, that "Ashton asks this Court to Direct the Appellate Division and the Grievance Committee to expunge their records relating to plaintiff", and offered this as the reason for the dismissal of my claim. The Court of Appeals in similar erroneous fashion stated; "His claims against the state defendants concern his request that a federal court overturn prior decisions of a state court...." (Appendix A).

Both are categorically untrue and both seem to have deliberately ignored the basis of my claim against the individual state defendants who as judges of the Appellate Division of the Supreme Court of the State of New York and as attorneys representing the grievance committee, an agency of the State of New York, were

state employees acting under color of authority when they conducted an illegal hearing to disbar me from the practice of law. The hearing was illegal because the Judges appointed a referee who was too old, too biased, infirmed, improperly certified, and generally unfit, to conduct such a hearing, (see Exhibits 47 to 51 and paragraphs 37 to 48 of the Complaint), in violation of New York State Judiciary law, Art. 4A Sects. 90(4)(h), 115(1) and (2). As a consequence, there was misstatement of the facts, manipulation of a witness and the evidence that resulted in my disbarment from the practice of law in New York State. This was clearly articulated in my complaint as a violation of my civil rights and is actionable under 42 U.S.C.A. 1983 which imposes liability on every person who, under color of any statute, ordinance, regulation, custom, or usage, or any state or territory deprives a citizen of the United States of any rights, privilege, or immunities secured by the Constitution and laws. This is a clear violation of the 14th Amendment to the Constitution that provides equal protection of the laws, and is actionable and consistent with the holding in U.S. ex rel. Smith v. Robinson, 495 F. Supp. 696(E. D.Pa. 1980) which states that a summary judgment record in a suit by a prisoner who claimed that a prison disciplinary proceeding violated his civil right, created issues of fact precluding a grant of summary judgment in favor of the Chairman of the hearing committee. Though not on "all fours", this case is very similar to my claim. It is also well established in the same District Court in New York, in Woe v. Mathews, 434 U.S. 1048, 54 L. Ed. 2d. 799(1976) that, to succeed on a motion to dismiss, asserting that the case was foreclosed by controlling precedent and that the complaint did not raise substantial federal question, the federal defendants have to establish that plaintiffs claims were constitutionally insubstantial because prior decisions inescapably rendered the claims frivolous. My complaint spells out the Federal laws violated by state actors and the Federal Defendants, and how my

constitutional guarantees and the federal laws were violated. To the contrary, the defendants have not established that my claims were constitutionally insubstantial by precedent. This, therefore establishes a credible federal question that should preclude a summary dismissal.

For Judge Mishler and the Court of Appeals to ignore these violations against me, and suggest that because of a requested relief, my case should be summarily dismissed, is spurious and disingenuous. This relief was sought as a matter of fundamental fairness in a separate and distinct claim, brought under the Privacy Act of 1974, 5 U.S.C.A. 552a(g)(1). There I begged the District Court to expunge, in whole or in part, records in the Federal agencies that were inaccurate or acquired by fatally flawed procedures. In an exercise of fairness, and recognizing that the Privacy Act is not applicable to state agencies, I begged the Court to apply the same principles to the state agencies pursuant to 42 U.S.C.A. 1988 which permits the federal courts to employ that combination of federal law, common law, and state law to vindicate me by expunging the state records and reinstating me to my practice of law. This request has nothing to do with my 42 U.S.C.A. 1983 Claim of my civil rights violation, the remedy to which, need not disturb the State court's decision. The request for reinstatement is incidental, only if the court deems it proper. Therefore, for both Judge Mishler and the Court of appeals to dismiss my 42 U.S.C.A. 1983 claim contending that I am seeking to have a federal court overturn prior decisions of a state court, and correct alleged errors in the record of disbarment is inaccurate and injudicious, and I respectfully submit that it was deliberate since no where in their decisions is there any mention of the state laws I allege that were violated to my detriment.

Further, they have both cited District of Columbia

Court of Appeals v. Feldman, 460 U.S. 462 (1983), and Zimmerman v. Grievance Comm. of the Fifth Judicial District., 726 F.2d 85(2d Cir.1984), as the reason for dismissing my complaint, contending that they have no authority to review final judgments of a state court in judicial proceedings. The facts and conclusions in those cases have nothing to do with my claim of a 42 U.S.C.A. 1983 Civil rights violation. In the "Feldman" case, ibid, even though Justice Brennan held that the United States District Courts have no jurisdiction over challenges to state court decisions in particular cases...., he went on to state categorically that the United States District Courts do have subject matter jurisdiction over general challenges to state bar rules promulgated by state courts in non judicial proceedings, which do not require review of a final state court judgment.

Unlike, Feldman, I am not asking for waivers of the Bar admission rules, I challenge the discriminatory way in which the rules were applied in order to exclude me from the practice of law. The real question therefore, is whether or not the statutes and regulations valid on their face, have been applied in a discriminatory manner. This, I submit, is a factual question on which I should be permitted to proceed, (see 16A Am Jur 2d Constitutional Law Sects.802, 803) and would have been encouraged by this Court, particularly since it makes out a 42 U.S.C.A.1983 (civil rights violation) claim, violating my Sixth and Fourteenth Amendments guarantees and does not necessitate a review of the final State Court judgment, in that, I need not be reinstated to my practice in order to bring a civil rights violation action. In the Zimmerman case, Zimmerman was censured for violating a state rule regulating lawyer advertising which he tried to get the District Court to review by cloaking the censure in a First Amendment violation. This is in stark contrast to my claim that the individual state defendants violated my Sixth and Fourteenth Constitutional Amendments by appointing a referee that was unfit to

conduct my hearing in violation of N.Y. State Judiciary law Art.4A sects. 90(4)(h),115(1)and(2). To summarily dismiss my entire case, three causes of action, 3 sets of defendants and a claim against federal agencies, because I requested vindication under 42 U.S.C.A.1988 is wrong, and a miscarriage of justice. To avoid exposure and conceal what appears to be a very deliberate distortion of the judicial process, the Court of Appeals has ordered that their decision not be published or used as precedential authority but can be used for purposes of collateral Estoppel or Res Judicata. These appear to be signs of a misplaced vendetta rather than the dispensation of justice.

(b) The Individual Federal Defendant

The same flawed logic and reasoning have been applied in dismissing my case against the Federal Defendants.

My claim against the individual Federal Defendants is based on the defamatory and libelous information they have surreptitiously placed in my file and propagated against me. Information which has no basis in fact whatsoever, and which had nothing to do with my conviction. Even though your Petitioner asserts that the conviction was contrived it is not the basis of my claim against the individual Federal Defendants, and unlike the "Heck" and "Tavarez" cases cited by both the Lower Courts, I need not reverse or expunge my conviction. In Tavarez v. Reno, 54 F.3d 109(2d Cir.1995), Tavarez was convicted of the offenses for which he claimed false arrest and malicious prosecution, in which event the court properly found that he must first expunge that record before he is entitled to bring a "Bivens" action. My claim is based on information of which I was not convicted. In Heck v. Humphrey, 997 F.2d 355 (7th Cir.1994), Heck's 1983 action was dismissed by the district court because the issues raised in that action directly implicated the legality of Heck's confinement, and for him to prevail, his criminal

conviction would have to be disturbed. My claims for libel and defamation are separate issues, resulting from different set of facts, and bears no relationship to my conviction. A judgment in my favor would not imply the invalidity of my conviction. The individually named Federal Defendants libeled and defamed me by manufacturing erroneous information accusing me of bribery, and a host of other heinous crimes (see the first 16 Exhibits of my Complaint) which had nothing to do with the criminal complaint (Exhibit 17 of the Complaint), or conviction (Exhibits 19,20 & 21 of the Complaint), against me. Where there exists such disputed factual issues, the courts have been consistently clear that summary judgment should be precluded. Two Second Circuit cases that reaffirm this position are; Capital Data Corp. v. Capital Nat. Bank, 778 F. Supp. 669 (2d Cir. 1991), and Noth v. Scheurer, 285 F. Supp. 81(2d Cir.1968), which have held that the Court's role in deciding a defendant's motion for summary judgment is not to resolve disputed issues, but rather to determine whether the record, taken as a whole, support any issues that require a trial, as the federal defendants' here did when they libeled and defamed me while acting under color of Federal law. The Supreme Court also precluded summary judgment in Lamb v. Connecticut General Life Insurance Co., 454 U.S.836, 70L.Ed.2d 116(1981), where it held that in a libel action alleging that an article in a magazine erroneously labeling plaintiff as an under world criminal figure raised an issue of material as to the truth of the published information which precluded summary judgment. This, surely can be likened to my case where erroneous information was secreted into my record, propagated in the community, even becoming a press release (Exhibit 29 of the Complaint), thus precluding summarily relief in favor of the Defendants.

In granting Defendants' motion for summary Judgment, the District Court exceeded its authority by trying the issues of fact, and then concluding that there

are no triable issues of fact. The District Court cannot try issues of fact on motion for summary judgment, but is empowered to determine only whether there are issues to be tried, Gross v. Kenton Structural and Ornamental Ironworks, Inc., 581 F. Supp. 390 (S.D. Ohio 1984).

In any event, the argument used by both courts in dismissing my complaint is in itself a contradiction, for while they dismissed my claim against the individual federal defendants, contending that the conviction was not expunged, they have also summarily dismissed my other claim to have my record expunged, without addressing any aspect of the claim.

(c) The ignoring of the 5 U.S.C.A. 552a(g)(1) claim, the 42 U.S.C.A. 1985(3) conspiracy claim, the motion to consolidate, and significant factual allegations, per se, renders the judgment void.

Both Lower courts have completely ignored; (i) my 5 U.S.C.A. 552a(g)(1) claim under the 1974 Privacy Act seeking to expunge the inaccurate, and fatally flawed information, in my record, which the Federal agencies now possess (ii) my 42 U.S.C.A. 1985(3) claim that is evidenced by communication of the same erroneous information (Exhibit 16 of the Complaint) between both the Federal and State offices and brought against the co-conspirators especially Victor Herwitz, an attorney, who was assigned by the Court of Appeals to undertake my appeal of a prior criminal matter, but who, rather than so doing, prepared an "Amicus Curiae" brief after I requested of him and the Court of Appeals that he be relieved as my attorney, thus jeopardizing my appeal by failing to raise significant appealable issues such as the Trial Judge's omission to charge the jury as to the materiality of my participation in the conspiracy. (iii) They have also ignored my motion to consolidate all the actions, and (iv) significant factual allegations.

I respectfully submit that the ignoring of these

claims, the motion, and the aforementioned factual allegations, particularly where there was no request for interlocutory relief, per se, renders the summary dismissal and the affirmation thereof void, in whole or in part.

Even in the "Bybyk" case, cited by the Court of Appeals, in affirming the summary dismissal, it is undeniably stated, "when an appeal comes before the Court of Appeals on motion to dismiss, it accepts as true factual allegations of the complaint, and reads the complaint liberally drawing all inferences in favor of the pleader, ..."

Both Judge Mishler in the District Court and the Court of Appeals have ignored the factual bases of the claims within my complaint. I believe this to be a travesty of justice.

The extraordinary reliance of the Courts below on misstatements of law and fact, and the deliberate mischaracterization of the claims, is such an extreme departure from accepted judicial proceeding that if they were deleted from the opinion, said opinion would have to be summarily reversed, in accordance with Rule 16.1 of this Court.

II

THE SUMMARY DISMISSAL OF MY COMPLAINT IN ITS ENTIRETY IS THE CULMINATION OF A PROCESS THAT CONCEALS ABUSES AND ATROCITIES IN THE JUDICIAL PROCESS THAT WHETHER TAKEN INDIVIDUALLY OR CUMULATIVELY IS DEVASTATING TO THE CONSTITUTIONAL GUARANTEES THE PROCESS DESIGNED TO PROTECT AND, LEFT UNCHECKED, HAS BEEN USED IN A VINDICTIVE MANNER TO TARGET UNPOPULAR CAUSES OR PERSONS SUCH AS AFRICAN AMERICANS ESPECIALLY THOSE OF WEST INDIAN DESCENT ENGAGED IN THE

CRIMINAL PRACTICE OF LAW, A GROUP WITH STRONG REPRESENTATION IN THE NEW YORK CITY AREA, AND TO WHICH I BELONG.

The abuses which the summary dismissal conceals and which, upon information and belief, are used by both the state and federal authorities, working hand-in-glove, to demonize and destroy unpopular persons, particularly African American attorneys, and those of West Indian decent, include;

(i) The government agents will distort facts and evidence and outright fabricate information, against an unsuspecting party.

(ii) With the help of improperly motivated or misguided prosecution attorney, (Rudolph Giuliani, in my case) an indictment or complaint is procured by misinforming or misleading a grand jury or other body charged with the finding of facts.

(iii) Rather than the case being heard by the originally assigned judge, it is usually "shopped", as mine were, for a judge who is perceivably less judicious.

(iv) How the process is then compromised, varies. In my instance, a significant charge regarding the materiality of my conduct to the conspiracy was not given to the jury.

(v) Despite this flagrant omission, the Judge refused to stay the sentence of one year and a day, and 5 years probation, contending that there were no appealable issues. I was then unable to properly appeal.

(vi) To give credence to this sentence the Court relies on an inaccurate and deliberately falsified probation report that misstated information given by friends and relatives.

(vii) An attorney, Victor Herwitz, was assigned, by the Court of Appeals, to do my appeal. Rather than undertaking my appeal he prepared an "Amicus Curiae" brief without discussing the merits of an appeal with me and after a written request to both himself, and the Court of Appeals, that he be relieved as my attorney.

(viii) Where the fruits of their investigation do not justify their efforts, the agents will manufacture and fabricate even more heinous information which they will maliciously propagate in the community for the sole purpose of destroying their target. In my case the concocted information, with no basis in fact, and much more heinous than anything with which I was charged, was surreptitiously placed in my record, propagated to my friends and relatives and the community at large, even by way of a press release authorized by Rudolph Giuliani.

(ix) This information is then carefully concealed when the Judges refuse any form of discovery, including access to exculpatory information within the file, and the agencies continue to hide behind exceptions to the Freedom of Information and Privacy Acts. My experience is that the documents to which I am entitled under Jencks v. U.S. Tex., 353 U.S. 657, 1L. Ed. 2d 1103 (1957) are still not released even after my suit under the Freedom of Information and Privacy Acts docketed at CV-94-3793 in the Eastern District of New York;

a) I have been refused access to the entire Grand Jury minutes, even the pertinent portions. The minutes, in an unusual manner, were never docketed in the clerk's office.

b) I have been refused access to an envelope that was ordered sealed by Judge Sprizzo. An envelope, I believe, that contains exculpatory information that would vindicate my alleged participation in the criminal conspiracy.

c) The federal agencies, to date, in a direct challenge to the rule of law, have still only made superficial releases of information contained in my criminal file.

(x) Any attempt to redress these abuses by the persons so targeted will meet with continued resistance. This Civil Action, I brought in the District Court (E.D.N.Y.) seeking to redress most of the atrocities of which I complain. Again, my case was "shopped" until it

landed before Judge Mishler who summarily dismissed it:

a) while effectively barring any "discovery"
b) without addressing the bases of my claims
c) without acknowledging two entire claims within the Complaint.
d) by misstating the facts and law, and
e) without the customary oral argument on the motion, even though it was requested.

(xi) To seal the fate of the targeted person, the Court of Appeals rubber stamps the decision of the District Court.

In my instance, the Court of Appeals used the same flawed logic and abuses to affirm the summary dismissal and as part of its decision orders that their decision not be reported or used as precedential authority but can be referred to in the event of collateral Estoppel or res judicata.

This only serves to conceal and cover up abuses and atrocities of the judicial process without any accountability, leaving the distinct impression that the judicial process is being used to exact a vendetta rather than dispensing justice.

(xii) The consequence of this orchestrated effort is to have the target person or group falsely ruined and demonized with the stamp of Authority, and inspite of the ruling of the Court of Appeals, all the atrocities of which I complain, are now law:

a) the case cannot now be fully developed because of the lack of discovery

b) significant issues raised in the complaint cannot now be heard by a competent Court, including the conduct of the defendants and any immunity to which they may be entitled, and the extent to which relief requested pursuant to 42 U.S.C.A.1988 may be granted.

c) the misconduct of assigned counsel and the other individual defendants have now been validated.

d) "Judge Shopping" which should be frowned upon by all courts is now permissible.

(e) the conspiracy that was so evident and dates back prior to my disbarment by the State Court in April of 1983, is now covered up.

(xiii) The decision by the Court of Appeals also serves to validate the hearing conducted by Judge Koota in the state court. He was appointed as a referee inspite of the fact that legally he was too old, too infirmed, too biased and had a reputation in the community for being a dishonest publicity seeker who would do anything to gain a conviction, particularly if the case involved an African American.[1] As an African American, it was impossible to get a fair hearing before Judge Koota. This showed up in his findings, which were repeated verbatim by Judge Mishler (EDNY) in his opinion (Appendix B) summarily dismissing my civil complaint, and provides a clear example of how select persons and groups are targeted for mistreatment by the judiciary;

(a) I did not convert escrow funds to my own use. There were valid explanations offered for the two occasions in which $2000.00 were prematurely withdrawn from the account, reasons which Mr. Koota's bigotry did not permit him to accept.

(b) The $15,000.00 check did not represent funds which should have been escrowed.

(c) I did not fail to cooperate with the grievance committee as the referee's report itself acknowledged.

(d) I did not convert a client's $2000.00 to my own use.

(e) I did produce the entire record of my escrow account as it was produced by the bank.

(f) The account was not overdrawn on 48 occasions, only on 4 occasions, one of which ran for an extended period, with the banks permission, while I was

---

[1]This information was taken from his obituary published in the NY Times 7/23/84 and another article published in the NY Times Magazine 3/19/67 (Exhibit 51 of my civil complaint).

outside the country.

(g) The charge for practicing law after my disbarment arose out of appearances I made three weeks after my disbarment while winding up my practice pursuant to N.Y. State Law, 22 NYCRR 691.10(e), that permits a Disbarred Attorney to wind up and complete all pending matters within the effective date. I was never personally served with the order of Disbarment as required by Art. 4 Sect. 90(6) of N.Y. State Judiciary Law that only gave 10 days to wind up, and consequently I proceeded to wind up and complete by operation of law. For this I was imprisoned and had to pay a fine. I respectfully submit that this conduct on the part of the State Employees was cunning and deliberate and was part of the collusion and conspiracy of which I complain, that was designed to destroy me.

Because of his personal bias and bigotry, Referee Koota refused to accept the truth and manipulated the information so as to paint the worse picture possible. This was not a fair hearing, neither was the hearing after the disbarment. Any appeal was jeopardized by counsel.

All the aforementioned abuses are now "covered up" by the summary dismissal of my Complaint, as affirmed by the Court of Appeals. As is evidenced, these abuses pervade the judicial process, and find such tolerance and comfort in our courts that it has become systemic, and while the occasional abuse such as police brutality, may expose itself, the abusive culture cannot be removed from the courts, without the intervention of this Court.

The granting of a writ is the last opportunity to afford an airing of these atrocities and expose a pattern of falsely demonizing and destroying persons and causes deemed unpopular, so as to pad their number of arrests and convictions and deceive the community at large into believing that they are waging and winning a war on

crime, all for political expedience and selfishness. It is important that the Courts ensure fairness and accuracy in the judicial process, particularly when it involves life, liberty, and livelihood.

III

CERTIORARI SHOULD BE GRANTED BECAUSE THE SUMMARY DISMISSAL OF THE CASE WITH A DIRECT ORDER THAT IT NOT BE PUBLISHED HAS RESULTED IN THE COVERING UP OF MALICIOUS CONDUCT THAT EFFECTIVELY PLACE THE PARTICIPANTS ABOVE THE LAW.

My claims are against judges in the Appellate Division of the Supreme Court of the State of New York, other state and federal governmental agents and administrators, and I also challenge the motives of some federal judges. The summary dismissal under these circumstances with a direct order not to publish the case, creates a wall of secrecy and suggest that colleagues-in-arms are exempt from liability and questions from the community they serve. It sends the wrong signal, particularly in an area of the country where the law is already viewed with much cynicism. Nobody should be placed above the law.

CONCLUSION

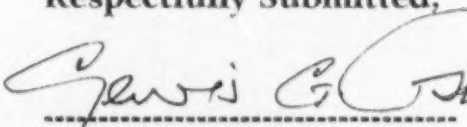
I respectfully submit that it is incumbent on this Court to preserve the integrity of the Judicial process by setting boundaries, or making sure that the established boundaries are not crossed by those charged with its protection. This Court must define what conduct is fair, reasonable and just and keep a constant check on the principals, if not, they will: manufacture, fabricate,

conjure and distort information; mislead the grand jury; shop judges and referees to guarantee a desired result; impose disproportionate penalties; have these atrocities sanctioned by the courts in subtle forms such as omitting significant charges to the petit jury; and where redress is sought, summarily dismiss the case by mischaracterizing the facts, applying erroneous law, and not having it published but used for collateral estoppel and res judicata, all against persons or groups they dislike. This is not just a double standard, but creates a separate standard that ensures that a mythical stereotype is preserved. Upon information and belief this is true of the African American community, both at the federal and state levels, especially attorneys, and those engaged in the practice of criminal law, a conclusion that cannot be escaped when we examine the disproportionate and disparative way in which we are punished.

In sum, the decision below demonstrates a compelling need for the exercise of this court's power of supervision so as to halt this modern day lynching. The decision should be summarily reversed, under Supreme Court rules 16.3 on the issues presented by this petition or the Court intervene in a manner that is deemed just.

The petition for writ of Certiorari should be granted.

Respectfully Submitted,



Lewis G. Ashton
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Date: 11th October, 1997

APPENDIX

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APPENDIX A
UNPUBLISHED

LEWIS G. ASHTON,

Plaintiff-Appellant,

v. **No. 96-6254**

Department of Veterans Affairs, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York
(CV 95-2477)

Argued:
Decided: June 12, 1997
Before WALKER, MCLAUGHLIN, PARKER Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: LEWIS G. ASHTON, pro se, Appellant; Dennis C. Vacco by Robert K. Drinan, Assistant New York State Attorney General, for State Appellees; Zachary Carter, by Gwen Pollak, Assistant United States Attorney, for Federal Appellees.

OPINION

Plaintiff-appellant Lewis G. Ashton appeals from the dismissal of his complaint against, Inter alia, various federal and New York agencies and officials. We review de novo the grant of a motion to dismiss. Painewebber Inc. v. Bybyk, 81 F. 3d 1193, 1197 (2d Cir. 1996).

Appellant's argument that the district court erred in dismissing his complaint against the state defendants for lack of subject matter jurisdiction is frivolous. His claims against the state defendants concern his request that a federal court overturn prior decisions of a state court, order his reinstatement as an attorney, and correct alleged errors in the record of his disbarment proceedings. "[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983). "The decision in Feldman clearly applies to federal district court challenges to attorney disciplinary orders rendered by state courts in judicial proceedings." Zimmerman v. Grievance Comm. of the Fifth Judicial Dist., 726 F. 2d 85, 86 (2d Cir. 1984).

Appellant's argument that the district court erred in dismissing his complaint against various federal agencies and officials is also frivolous. "[A] § 1983 plaintiff must prove that [his] conviction or sentence has been reversed" by a judicial body or expunged by executive action "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." Heck v. Humphrey, 114 S. Ct. 2364, 2372 (1994)(footnote omitted). Appellant's convictions have not been reversed or expunged and "[a] claim for damages based on a conviction or sentence that has not been invalidated as described [in Heck] is not cognizable under § 1983." Tavarez v. Reno, 54 F. 3d 109, 110 (2d Cir. 1995). To the extent appellant brings an action under Bivens v. six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the holding of Heck "appl [ies] to Bivens actions as well." Tavarez, 54 F. 3d at 110. Appellant's additional arguments are attempts to recast his complaint to avoid the various jurisdictional defects

inherent in his complaint and are without merit.

We have considered all of appellant's contentions on this appeal and have found them to be without merit.

For the reasons set forth above, the judgment of the district court is hereby

AFFIRMED.

/S/ Hon. John M. Walker, Jr.,
United States Circuit Judge

/S/ Hon. Joseph M. McLaughlin,
United States Circuit Judge

/S/ Hon. Fred I. Parker,
United States Circuit Judge

APPENDIX B

In the United States District Court for the Eastern District of New York

LEWIS G. ASHTON,	)	
	)	
Plaintiff, Pro Se	)	CV 95 - 2477
	)	
- against -	)	
	)	
Department of Veterans' Affairs, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION
dated: Aug. 19, 1996

MISHLER, District Judge

Defendants Department of Veterans' Affairs, Robert A. Hincken, Thomas M. Lastowka, W.D. Landau, Nicholas Giordano, Bruce T. Sackman, John and Jane Doe, Agents of the Department of Veterans' Affairs, U.S. Department of Justice, Federal Bureau of Investigation, Mary Jo White, Rudolph Giuliani, Frederico E. Virela, Jr., and Ruth Glushien (federal defendants), move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(c) (judgment on the pleadings or for summary judgment as provided in Rule 56).

Defendants the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department, Milton Mollen, Vincent D. Damiani, Vito J. Titone, Leon D. Lazer, Guy J. Mangano, William C. Thompson, Lawrence Bracken, Richard A. Brown, Charles B. Lawrence, The Estate of Aaron Koota, The Grievance Committee for the Second and Eleventh

Judicial Districts of the State of New York, Frank A. Finnerty, Jr., and Richard C. Harrow (state defendants), move to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(1) (lack of jurisdiction over the subject matter), (2) (lack of jurisdiction over the person), and (6) (failure to state a claim upon which relief can be granted).[1]

Plaintiff cross-moved for summary judgment against all defendants.

FACTS

Plaintiff, Lewis G. Ashton, was admitted to practice by the Appellate Division of the New York State Supreme Court, Second Judicial Department on May 5, 1976.

Petitions dated July 8, 1981, and December 16, 1981, were filed by the Grievance Committee of the Second and Eleventh Judicial Districts charging Ashton with professional misconduct, inter alia (1) converting escrow funds, (2) failing to perform legal services for which he was paid, (3) issuing a $15,000.00 check representing funds which should have been in his escrow account, which check was returned for insufficient monies in the escrow account, and (4) failing to cooperate with the Grievance Committee investigating the charges (which charge was withdrawn), (5) receiving $2,000.00 from a client to be held in escrow pursuant to a contract for the sale of real estate which he converted to his own use, (6) failing to maintain a proper special account pursuant to Section 691.12(a) of the Rules of the Appellate Division, failing to produce escrow account records pursuant to subpoena; the escrow account maintained at the European American Bank during the period June 4, 1979 and December 8, 1980, was

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[1]The state defendants moved to dismiss the complaint in July 1995. Plaintiff cross-moved for summary judgment. Federal defendants thereafter moved for judgment on the pleadings.

overdrawn on 48 occasions.

In a report dated September 8, 1982, the Special Referee found that Ashton committed professional misconduct as charged in One, Two, Three, Five and Six of the petition (Charge Four having been withdrawn).

The Appellate Division, by order dated April 11, 1983, confirmed the report of the Special Referee and disbarred Ashton from the practice of law and

> ORDERED that pursuant to statute (Judiciary Law, § 90), effective April 11, 1983, the respondent Lewis G. P. Ashton, admitted under the name Lewis George Ashton, be and he hereby is commanded to desist and refrain: (1) from practicing law in any form, either as principal or as agent, clerk or employee of another; (2) from appearing as an attorney or counselor at law before any court, judge, justice, board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto; and (4) from holding himself out in any way as an attorney or counselor at law.

Ashton was charged with practicing law after the issuance of the order disbarring him from the practice of law. The Court appointed Stanley Buchsbaum as Special referee to hear and report. The Special Referee found that Ashton (1)practiced law on May 5, 1983, by conducting a Mapp and Huntley Hearing in the Supreme Court, Queens County; (2) practiced law on May 5, 1983, by commencing a jury trial in the Supreme Court, Queens County; and (3) failed to file an affidavit of compliance with the order of disbarment within ten days of the date of the order as required by Section 691.10 subd. (f) of the Rules of the

Appellate Division.[2] On August 2, 1984, Ashton was sentenced to a prison term of ten days and fined for the contempt of court.

Ashton was convicted on one count of conspiracy (18 U.S.C. § 371) and three Counts of false statements (18 U.S.C. § 1001) based on false statements made to the Veterans Administration in applications for the purchase of V.A. homes in foreclosure sales. Ashton's application for bail pending appeal was denied on the ground that "the defendant has not raised any substantial appellate issues." (Memo and order, Sprizzo, U.S.D.J. August 27, 1986). Victor J. Herwitz was assigned as appellate counsel for Ashton. Herwitz filed an Anders brief (Anders v. California, 386 U.S. 738 (1967))expressing the opinion that there were no non-frivolous arguments and asked to be relieved as counsel. The conviction was affirmed by summary order, 812 F. 2d 713 (2d Cir. 1987). Judge Sprizzo sentenced Ashton to a term of imprisonment of one year and a day and imposed a probationary term of five years.

COMPLAINT

The first cause of action seeks relief under the Privacy Act, 5 U.S.C. § 552(a) by expunging "the records of the V.A.,the Justice Department and the Appellate Division, including the Grievance Committee, on the basis that they are either (a) inaccurate, (b) acquired by flawed procedure, or (c) are duly prejudicial . . ." (Plaintiff's memo, p.3).

The second cause of action seeks money damages for violation of his constitutional rights (42 U.S.C. §

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[2]A fourth charge was not sustained.

1983) in that he was deprived of his right to practice law, without due process of law, through lies transmitted by the V.A. to the Grievance Committee, in conspiracy with the Special Referee and the Appellate Division.

The third cause of action seeks money damages pursuant to 42 U.S.C. § 1985(3) against defendants "acting privately, conspired in the same manner, for the same purpose and the same result as 'outlined in the second cause of action." (Plaintiff's memo, p.4).

Ashton expressed his theory of liability (1) "against the state defendants is not only that the disciplinary charges were contrived, but that the entire proceedings were unauthorized, and conducted illegally and was part of a conspiracy with the Veterans Administration."

The Veterans Administration presented the same lies to a Grand Jury in order to secure an indictment." (Plaintiff's memo, p.5).

DISCUSSION

Claims Against State Defendants

We discuss the question of subject matter jurisdiction before examining the other issues presented by the state defendants.

Ashton asks this court to direct the Appellate Division and the Grievance Committee to "expunge their records relating to plaintiff . . ." and reinstate him as an attorney at law thereby vacating the order or disbarment.

The Court in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S. Ct. 1303, 1311 (1983), holds that the United States District Court does not have the authority to review final determinations of the District of Columbia Court of

Appeals in judicial proceedings. ("Review of such determinations can be obtained only in this Court. See 28 U.S.C. § 1257"). The Court cited Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149 (1923). What has become known as the Rooker-Feldman doctrine forbids the federal district court appellate review of state court judgments. See Ritter v. Ross, 992 F.2d 750, 753 (7th Cir. 1993), cert. denied, 510 U.S. 1046, 114 S. Ct. 694 (1994). "Disciplinary proceedings before the New York Appellate Division are judicial in nature . . . ." Zimmerman v. Grievance Committee, 726 F. 2d 85, 86 (2d Cir.), cert. denied, 467 U.S. 1227, 104 S. Ct. 2681 (1984) (citing Erdmann v. Stevens, 458 F. 2d 1205, 1208-09 (2d Cir.), cert. denied, 409 U.S. 889, 93 S. Ct. 126 (1972) and Turco v. Monroe County Bar Association,554 F. 2d 515 (2d Cir.), cert. denied, 434 U.S. 834,98 S. Ct. 122 (1977).

In both, Erdmann and Turco, plaintiffs sought relief from orders of disbarment based on a claim of violation of constitutional rights. In Erdmann, the court rejected plaintiffs claim that the disciplinary proceeding was an administrative proceeding, holding that "it amounts to a judicial inquiry." Erdmann , 458 F.2d at 1208. In Turco, the court affirmed dismissal of the complaint "under the doctrines of res judicata and collateral estoppel." Turco, 554 F. 2d at 520. The court noted that in Tang v. Appellate Division, 487 F.2d 138, 141 (2d Cir. 1973), cert. denied, 416 U.S. 906, 94 S. Ct. 1611 (1974), it relied on lack of jurisdiction (citing Rooker). Turco, 554 F.2d at 520-21. This court lacks subject matter jurisdiction. We do not consider the other defenses raised by the state defendants. Cantor Fitzgerald v. J. Bart Peaslee, 88 F.3d 152, 155(2d Cir. 1996) "(Customarily, a federal court first resolves any doubts about its jurisdiction over the subject matter of a case before reading the merits or otherwise disposing of the case.").

The complaint is dismissed as to the state

defendants.

Claims Against Federal Defendants

In addition to money damages, Ashton is seeking a declaratory judgment, declaring that the Southern District federal defendants maliciously conspired to falsely accuse Ashton, resulting in a conviction based on perjured testimony. (Complaint, ¶ 88). He alleges that all the acts which were the basis for conviction "were unwitting and innocently done at the request of Diane McGhee." (Complaint, ¶ 89). The request apparently seeks to remove a barrier to reinstatement to practice law. Ashton claims a violation of his civil rights in the malicious prosecution conducted by the federal defendants. In order to sustain the claim the plaintiff must establish that the criminal proceeding that was maliciously commenced terminated in his favor. Janetka v. Dabe, 892 F.2d 187, 189 (2d Cir. 1989); Cameron v. Fogarty, 806 F.2d 380, 387 (2d. Cir. 1986), cert. denied, 481 U.S. 1016, 107 S. Ct. 1894 (1987). In Heck v. Humphrey, ___U.S.___, 114 S. Ct. 2364, 2372 (1994), the Court holds:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus.

The Court in Hech also holds to permit a convicted criminal to proceed with such civil claims would amount to an impermissible collateral attack on the conviction. Id. at 2371; see also Bagley v. CMC

Real Estate Corp., 923 F.2d 758, 762 (9th Cir. 1991), cert. denied, 502 U.S. 1091, 112 S. Ct. 1161-62 (1992) (citing Emich Motors Corp. v. General Motors Corp. v. General Motors Corp., 340 U.S. 558, 568-69, 71 S. Ct. 408, 413-14 (1951) ("A plaintiff may be estopped from bringing a civil action to challenge an issue which was 'distinctly put in issue and directly determined' in a previous criminal action.")).

The judgment of conviction is a complete defense to the claims asserted against the federal defendants. The complaint is dismissed as to the federal defendants.

We dismiss the action against defendant Victor J. Herwitz. The allegation that he participated in the conspiracy by filing an "Anders" brief is insufficient. (Complaint, ¶ 90).

We find no need to discuss other answers to the complaint, i.e., absolute immunity, qualified immunity available to individual defendants, the failure to file a claim for money damages under the Federal Tort Claims Act and the Statue of Limitations.

ORDER

The complaint is dismissed, and it is

SO ORDERED.

The Clerk is directed to enter judgment in favor of the defendants and against the plaintiff Lewis G. Ashton, dismissing the complaint.

/S/ JACOB MISHLER
U.S. District Judge

APPENDIX C

In the United States District Court for the Eastern District of New York.

LEWIS G. ASHTON	)	
Plaintiff, Pro Se	)	
	)	**CV 95-2477**
-against-	)	
	)	
Department of Veterans' Affairs,	)	
et.al.,	)	
	)	
Defendants.	)	

MEMORANDUM DECISION

(Dated: Sept. 25, 1996)

MISHLER, District Judge

Lewis G. P. Ashton ("Plaintiff") moves pursuant to Federal Rule of Civil Procedure 59 (e) for reconsideration of this Court's Memorandum of Decision and Order dated August 19, 1996, familiarity with which is presumed. See Ashton v. Dep't of Veteran's Affairs, et. al., No. CV 95-2477 (E.D.N.Y. August 16, 1996). Plaintiff claims that the Court "clearly misapprehended" the facts and legal theory articulated in his complaint and incorrectly decided his claims brought pursuant the Privacy Act, 5 U.S.C. §552a(g)(1)(c), and pursuant to 42 U.S.C. § 1983, based upon violations his Sixth and Fourteenth Amendment rights.

DISCUSSION

Federal Rule of Civil Procedure 59(e) permits a court to alter or amend a judgment once it has been entered upon a demonstration that there has been an intervening change of controlling law, that there is new

evidence which bears upon the issues decided, or that the Court overlooked controlling decisions or factual matters that were put before the Court on the underlying motion. See Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Corp., 948 F.2d 111, 115(2d Cir. 1991), cert. denied, 504 U.S. 910 (1992). The standard is strict "in order or dissuade repetitive arguments on issues that have already been considered fully by the Court." Eisert v. Town of Hempstead, 918 F.Supp. 601,606 (E.D.N.Y. 1996) (citing Ruiz v. Commissioner of the D.O.T. of New York, 687 F. Supp. 888, 890 (S.D.N.Y.), aff'd, 858 F.2d 898 (2d Cir. 1988)). Thus, "reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transportation, Inc., 70 F.3d 255, 256 (2d Cir. 1995); see Robins v. Max Mara, U.S.A., 923 F. Supp. 460, 472 (S.D.N.Y. 1996) (citing Morser v. AT&T Information Systems, 715 F.Supp. 516, 517 (S.D.N.Y. 1989)).

Plaintiff has failed to satisfy this standard, offering neither new factual evidence, nor controlling legal authority which might reasonably be expected to alter this Court's prior determination.

ORDER

Plaintiff's motion for reconsideration is therefore denied, and it is

SO ORDERED.

/S/ JACOB MISHLER
U.S. District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 17 day of October, 1997, I caused a true and correct copy of the above and foregoing instrument to be deposited in the U.S. Mail, First Class Postage fully prepaid thereon to:

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